

ORIGINAL

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 7 COSTCO WHOLESALE CORPORATION

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12 Attorneys for Defendant
 Premier Incentive Group, LLC

14 UNITED STATES DISTRICT COURT
 15 SOUTHERN DISTRICT OF CALIFORNIA

17 R & R SAILS, INC. dba HOBIE
 18 CAT COMPANY,

19 Plaintiff,

20 v.

21 PREMIER INCENTIVE GROUP,
 22 LLC; COSTCO WHOLESALE
 CORPORATION; and DOES 1-100,
 23 Inclusive,

24 Defendants.

Case No. **'11 CV 2866 JLS WMC**

**DEFENDANT COSTCO
 WHOLESALE CORPORATION'S
 NOTICE OF REMOVAL OF CIVIL
 ACTION 18 U.S.C. § 1964; 28 U.S.C.
 §1441**

**(SUPERIOR COURT OF
 CALIFORNIA, COUNTY OF SAN
 DIEGO, CASE NO. 37-2001-
 00053159-CU-BT-NC)**

26 TO THE CLERK OF THE ABOVE ENTITLED COURT, ALL PARTIES
 27 AND THEIR COUNSEL OF RECORD:
 28

1 PLEASE TAKE NOTICE that Defendants Costco Wholesale Company
2 ("Costco") and Premier Incentive Group, LLC ("Premier") hereby remove the
3 above-captioned matter, which was commenced as Case Number
4 37-2011-00053159-CU-BT-NC in the Superior Court of the State of California for
5 the County of San Diego, to the United States District Court for the Southern
6 District of California pursuant to 18 U.S.C. § 1964, and 28 U.S.C. §1441. In
7 support of its Notice of Removal, Costco and Premier state the following:

8
9 1. Costco and Premier were not served with a copy of the original
10 Complaint. Costco was served with a copy of the First Amended Complaint on or
11 about April 14, 2011. Premier was served with a copy of the First Amended
12 Complaint on or about April 25, 2011.

13
14 2. The First Amended Complaint alleged five causes of action, all arising
15 solely under state law, i.e. unfair competition, intentional interference with
16 contractual relations, negligent interference with economic relations, unjust
17 enrichment and fraud. The fraud cause of action did not name Costco as a
18 defendant.

19
20 3. While there appeared to be diversity of citizenship between plaintiff
21 and the defendants named in the First Amended Complaint (ignoring the Doe
22 defendants), it could not be determined from the face of the pleading whether or not
23 the amount in controversy exceeded \$75,000. Discovery responses subsequently
24 received by Costco suggested that it did not.

25
26 4. On November 18, 2011, the Superior Court granted Plaintiff leave to
27 file a Second Amended Complaint. The Second Amended Complaint was deemed
28 filed and served that date. The Second Amended Complaint added a cause of

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1 action against Costco for fraud and causes of action against Costco and Premier for
 2 conversion and conspiracy, and, for the first time, a claim arising under federal law,
 3 violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18
 4 U.S.C. § 1961, et seq.

5
 6 5. By virtue of the filing of the Second Amended Complaint, the action is
 7 now subject to removal. If the First Amended Complaint was not subject to
 8 removal because the amount in controversy was less than \$75,000, then the Second
 9 Amended Complaint is the first pleading subject to removal, and therefore
 10 removable under 28 U.S.C. § 1446(b).

11
 12 6. If the First Amended Complaint had been removable on the grounds of
 13 diversity of citizenship because the amount in controversy did exceed \$75,000, the
 14 action is nevertheless removable now. The addition of the federal RICO claim
 15 changes the character of the litigation so as to make it substantially a new lawsuit.
 16 *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006); *Craig Food*
 17 *Indus. v. Taco Time Intern., Inc.*, 469 F.Supp. 516 (D. Utah. 1997) (allowing
 18 federal question removal even though the original pleading could have been
 19 removed based on diversity); 14C Wright and Miller, FEDERAL PRACTICE AND
 20 PROCEDURE § 3731 (2009).

21
 22 7. Costco's Notice of Removal is timely under 28 U.S.C. § 1446(b)
 23 because it is filed within thirty days of date on which the Second Amended
 24 Complaint was deemed filed and served. That time is measured from the date the
 25 state court granted the motion to amend. *Sullivan v. Conway*, 157 F.3d 1092, 1094
 26 (7th Cir. 1998). *Lion Raisins, Inc. v. Fanucchi*, 788 F. Supp. 2d 1167, 1174 (E.D.
 27 Cal. 2011).

1 8. A contrary rule would encourage plaintiffs suing out-of-state
2 defendants and wishing to avoid a federal forum to omit federal claims from the
3 initial pleading and to amend thirty days from the date of service. It would also
4 encourage out-of-state defendants to remove state court claims out of concern that a
5 federal claim might be added at a date too late to remove.

6
7 9. Removal to this judicial district is proper under 28 U.S.C. § 1441(a)
8 because it embraces the place where this action was originally pending. The case
9 was commenced in San Diego County.

10
11 10. The following constitutes all of the process, pleadings and other papers
12 served on and by Costco and Premier in this action (not including discovery
13 documents which are not generally filed with the Court). True and correct copies
14 are attached hereto and incorporated herein:

15 Exhibit 1: First Amended Complaint, filed April 11, 2011; Notice of
16 Case Assignment; Alternative Dispute Resolution (ADR) Information

17 Exhibit 2: Summons, filed April 11, 2011

18 Exhibit 3: Ex Parte Application for (1) Temporary Restraining
19 Order; and (2) Order to Show Cause re: Preliminary Injunction, dated April 14,
20 2011

21 Exhibit 4: Declaration of Ruth Triglia in Support of Ex Parte
22 Application for (1) Temporary Restraining Order; and (2) Order to Show Cause re:
23 Preliminary Injunction, dated April 14, 2011

24 Exhibit 5: Declaration of Steven J. Cologne in Support of Ex Parte
25 Application for (1) Temporary Restraining Order; and (2) Order to Show Cause re:
26 Preliminary Injunction, dated April 14, 2011

27 Exhibit 6: Notice of Ex Parte Application and Ex Parte Application
28 for Expedited Discovery, dated April 11, 2011

1 Exhibit 7: Defendant Costco Wholesale Corporation's Opposition to
2 Ex Parte Application for Temporary Restraining Order; Declaration of Steve
3 Hardie; Evidentiary Objections, filed April 18, 2011

4 Exhibit 8: Defendant Costco Wholesale Corporation's Opposition to
5 Ex Parte Application for Expedited Discovery, filed April 18, 2011

6 Exhibit 9: Minute Order dated April 19, 2011, continuing hearing on
7 ex parte applications

8 Exhibit 10: Minute Order dated April 21, 2011, granting temporary
9 restraining order as to defendant Premier and denying as to defendant Costco,
10 setting hearing on preliminary injunction, and setting deposition to be taken in the
11 office of defendant's attorney

12 Exhibit 11: Order granting temporary restraining order as to
13 defendant Premier and denying as to defendant Costco, and setting hearing on
14 preliminary injunction, filed April 21, 2011

15 Exhibit 12: Order granting ex parte application for expedited
16 discovery, filed April 21, 2011

17 Exhibit 13: Notice of Hearing on Demurrers; Demurrers of Defendant
18 Costco Wholesale Corporation to Plaintiff's First Amended Complaint, filed May
19 16, 2011

20 Exhibit 14: Answer of Premier Incentive Group, LLC to First
21 Amended Complaint, dated June 3, 2011

22 Exhibit 15: Opposition to Demurrers of Costco Wholesale
23 Corporation to Hobie Cat Company's First Amended Complaint, dated June 20,
24 2011

25 Exhibit 16: Reply Brief in Support of Demurrers of Defendant Costco
26 Wholesale Corporation to Plaintiff's First Amended Complaint, filed June 24, 2011

27 Exhibit 17: Minute Order dated July 1, 2011 overruling demurrer to
28 first cause of action and sustaining demurrer without leave to amend to fourth cause

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1 of action.

2 Exhibit 18: Notice of Ruling re Defendant Costco Wholesale
3 Corporation's Demurrers to Plaintiff's First Amended Complaint, filed July 5, 2011

4 Exhibit 19: Answer of Defendant Costco Wholesale Corporation to
5 Plaintiff's First Amended Complaint, filed July 9, 2011

6 Exhibit 20: Notice of Hearing served August 10, 2011, setting Civil
7 Case Management Conference for September 9, 2011

8 Exhibit 21: Case Management Statement of Defendant Costco
9 Wholesale Corporation, filed August 24, 2011

10 Exhibit 22: Case Management Statement of Defendant Premier
11 Incentive Group, LLC, dated August 24, 2011

12 Exhibit 23: Case Management Statement of Plaintiff, dated August
13 25, 2011

14 Exhibit 24: Minute Order dated September 9, 2011 setting trial and
15 other dates

16 Exhibit 25: Notice of Hearing served September 9, 2011, setting Civil
17 Jury Trial for April 13, 2012

18 Exhibit 26: Notice of Motion and Motion of Hobie Cat Company for
19 Leave to File a Second Amended Complaint, dated September 23, 2011

20 Exhibit 27: Notice of Lodgment in Support of Hobie Cat Company's
21 Motion for Leave to File a Second Amended Complaint, dated September 23, 2011

22 Exhibit 28: Declaration of Robert J. Fitzpatrick in Support of Motion
23 for Leave to File Second Amended Complaint, dated September 23, 2011

24 Exhibit 29; Memorandum in Support of Hobie Cat Company's
25 Motion for Leave to File a Second Amended Complaint, dated September 23, 2011

26 Exhibit 30: Costco's Memorandum of Points and Authorities in
27 Opposition to Plaintiff's Motion for Leave to File a Second Amended Complaint,
28 filed November 3, 2011

1 Exhibit 31: Reply of Hobie Cat Company in Support of Motion for
2 Leave to File Second Amended Complaint, dated November 10, 2011

3 Exhibit 32: Minute Order dated November 18, 2011 granting leave to
4 file a second amended complaint conditioned on plaintiff's permitting its president
5 and vice-president of sales to be deposed again, with each deposition not to exceed
6 2-1/2 hours, and deeming the second amended complaint filed and served on
7 November 18, 2011

8 Exhibit 33: Second Amended Complaint, deemed filed November 18,
9 2011

10 Exhibit 34: Notice of Hearing on Demurrers to Second Amended
11 Complaint; Demurrers of Defendant Costco Wholesale Corporation to Plaintiff's
12 Second Amended Complaint, filed November 22, 2011

13 Exhibit 35: Answer of Premier Incentive Group, LLC to Second
14 Amended Complaint, dated November 22, 2011


15 Exhibit 36: Opposition to Demurrers of Costco Wholesale
16 Corporation to Hobie Cat Company's Second Amended Complaint, dated
17 December 5, 2011

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1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

1 BASED ON THE FOREGOING, Costco hereby removes this action, now
2 pending in the Superior Court of the State of California for the County of San
3 Diego, to the United States District Court for the Southern District of California.
4


5 DATED: December 8, 2011

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

7
8 By: 
9 NORMAN H. LEVINE
10 Attorneys for Defendant COSTCO
11 WHOLESALE CORPORATION

12 DATED: December 7, 2011

EZRA BRUTZKUS GUBNER LLP

13 BY: 
14 RICHARD L. MANN
15 Attorneys for Defendant
16 Premier Incentive Group, LLC
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& MACHTINGER LLP
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CIVIL COVER SHEET

ORIGINAL

I (a) PLAINTIFFS (Check box if you are representing yourself ☐)

R & R SAILS, INC. dba HOBIE CAT COMPANY;

DEFENDANTS

PREMIER INCENTIVE GROUP, LLC; COSTCO WHOLESALE CORPORATION; and DOES 1-100, Inclusive.

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)

STEVEN J. COLOGNE, ESQ. (SBN 118534)

HIGGS, FLETCHER & MACK LLP

401 West "A" Street, Suite 2600

San Diego, CA 92101-7913

Telephone: (619) 236-1551 Facsimile: (619) 696-1410

Attorneys (If Known)

FILED

See Attachment.

DEC 08 2011

71 CV 2866 JLS WMc

II. BASIS OF JURISDICTION (Place an X in one box only.)

CLERK U.S. DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BY

PARTIES - For Diversity Cases Only

(Place an X in one box for plaintiff and one for defendant.)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

Citizen of This State

Citizen of Another State

Citizen or Subject of a Foreign Country

PTF DEF

☐ 1 ☐ 1

Incorporated or Principal Place of Business in This State

☐ 2 ☐ 2

Incorporated and Principal Place of Business in Another State

☐ 3 ☐ 3

Foreign Nation

PTF DEF

☐ 4 ☐ 4☐ 5 ☐ 5☐ 6 ☐ 6

IV. ORIGIN (Place an X in one box only.)

- ☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☐ Yes ☒ No (Check 'Yes' only if demanded in complaint.)CLASS ACTION under F.R.C.P. 23: ☐ Yes ☒ No☐ MONEY DEMANDED IN COMPLAINT: \$

VI. CAUSE OF ACTION (Cite the U. S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

RICO, 18 U.S.C. § 1961 et seq. Alleged improper acquisition of goods.

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	TORTS PERSONAL INJURY	TORTS PERSONAL PROPERTY	PRISONER PETITIONS	LABOR
<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus	<input type="checkbox"/> 710 Fair Labor Standards Act
<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 530 General	<input type="checkbox"/> 720 Labor/Mgmt. Relations
<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act
<input type="checkbox"/> 450 Commerce/ICC Rates/etc.	<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Fed. Employers' Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 540 Mandamus/Other	<input type="checkbox"/> 740 Railway Labor Act
<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	BANKRUPTCY	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 790 Other Labor Litigation
<input checked="" type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations	<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 22 Appeal 28 USC 158	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act
<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 423 Withdrawal 28 USC 157	FORFEITURE / PENALTY	PROPERTY RIGHTS
<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	CIVIL RIGHTS	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 810 Selective Service	<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 850 Securities/Commodities/Exchange	<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 362 Personal Injury-Med Malpractice	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 875 Customer Challenge 12 USC 3410	<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 630 Liquor Laws	SOCIAL SECURITY
<input type="checkbox"/> 890 Other Statutory Actions	<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 61 HIA(1395ff)
<input type="checkbox"/> 891 Agricultural Act	REAL PROPERTY	IMMIGRATION	<input type="checkbox"/> 445 American with Disabilities - Employment	<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 892 Economic Stabilization Act	<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 462 Naturalization Application	<input type="checkbox"/> 446 American with Disabilities - Other	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 863 DIWC/DIWW 405(g)
<input type="checkbox"/> 893 Environmental Matters	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 463 Habeas Corpus-Alien Detainee	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 894 Energy Allocation Act	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 465 Other Immigration Actions			<input type="checkbox"/> 865 RSI (405(g))
<input type="checkbox"/> 895 Freedom of Info. Act	<input type="checkbox"/> 240 Torts to Land				FEDERAL TAX SUITS
<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice	<input type="checkbox"/> 245 Tort Product Liability				<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 950 Constitutionality of State Statutes	<input type="checkbox"/> 290 All Other Real Property				<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

FOR OFFICE USE ONLY: Case Number:

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

CV-71 (05/08)

CIVIL COVER SHEET

Page 1 of 2

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www.FormsWorkflow.com

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes

If yes, list case number(s):

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes

If yes, list case number(s):

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

- (a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named plaintiff resides.
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
San Diego County	

- (b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named defendant resides.
☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Washington (Costco Wholesale Corporation); Nevada (Premier Incentive Group, LLC)

- (c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH claim arose.
 Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
San Diego and others	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): Norman H. Levine Date December 8, 2011

NORMAN H. LEVINE

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3 -1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b)).
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

ATTACHMENT TO CIVIL CASE COVER SHEET

Section (b): Attorneys (If Known)

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